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ImageFIRST Uniform Rental Service, Inc. and Philadelphia Joint Board, Workers United, a/w SEIU.
Case 04-CA-166319

September 22, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On February 27, 2017, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There were no exceptions to the judge's dismissal of the allegations that the Respondent violated 8(a)(1) by instructing a van to drive past the union representatives, thereby preventing employees in the van from receiving the handbill, or by surveilling employees as they received the union handbill.

We do not rely on the judge's citation to *Brighton Retail, Inc.*, 354 NLRB 441 (2009), a case that was decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). We also do not rely on *Hills & Dales General Hospital*, 360 NLRB 611 (2014), cited by the judge, as it addresses issues that do not arise in this case.

In adopting the judge's finding that the Respondent violated the Act by threatening to summon and summoning the police, we find that the Respondent's conduct was not motivated by a reasonable concern over protecting its property interest. See *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004). Before the Respondent called the police, the union representatives had already moved to the shoulder of the highway at the Respondent's request; the union representatives were on the shoulder, not the Respondent's private property, when the police arrived; and it was not reasonable for the Respondent to believe it had a property interest in the shoulder that privileged it to exclude the union representatives from the shoulder, in light of the open and notorious public use of the shoulder by, for example, pedestrians, cyclists, and people picking up their mail, of which the Respondent was well aware. See *Food For Less*, 318 NLRB 646, 650 fn. 6 (1995) ("[E]ven assuming the [r]espondent properly controlled the sidewalk, it caused the union representatives to be ejected not only from the sidewalk but from [other areas]—clearly beyond any authority pursuant to a property interest held by the [r]espondent."), enf'd. in rel. part 95 F.3d 733 (8th Cir.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, ImageFIRST Uniform Rental Service, Inc., Columbia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its Columbia, Pennsylvania facility copies of the attached notice marked "Appendix"³ in English, Spanish, Tagalog, and Vietnamese. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 2015."

Dated, Washington, D.C. September 22, 2017

Mark Gaston Pearce,

Member

1996). Accordingly, we find that the Respondent violated the Act when it threatened to call and called the police on the basis that it sought to have the union representatives removed or arrested because they were engaged in protected union handbilling on the public shoulder of the highway adjacent to the Respondent's private property. We do not rely on the judge's finding that the union representatives' entry onto the Respondent's private property—by briefly standing on a grassy area and the Respondent's driveway—was a de minimis trespass. Accordingly, we do not address our colleague's discussion of that finding.

² We shall modify the judge's recommended Order to conform to the Board's standard remedial language.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

 Lauren McFerran,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, concurring.

On the morning of December 16, 2015, four nonemployee union representatives distributed leaflets to the Respondent's employees as the employees entered the Respondent's property. For the most part, the union representatives stood on the shoulder of the highway adjacent to the Respondent's property. At times, however, they stepped onto a grassy area between the shoulder of the road and the Respondent's parking lot to avoid passing traffic. After the Respondent directed them to stay off its property, however, the representatives confined themselves to the shoulder of the road, where they presented the leaflet to employees entering by automobile. If an automobile stopped at the bottom of the driveway, a representative would take a few steps into the driveway to deliver the leaflet.

I join my colleagues, for the reasons they state, in finding that the Respondent violated the National Labor Relations Act (NLRA or Act) both by demanding that the union representatives stop leafleting from the shoulder and, when they refused, by threatening to summon and summoning the police. See *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004); *Food For Less*, 318 NLRB 646, 650 fn. 6 (1995), *enfd.* in rel. part 95 F.3d 733 (8th Cir. 1996).

In his analysis of these allegations, the judge found that the representatives did not trespass when they entered the Respondent's driveway to distribute handbills, or that if they did trespass, it was de minimis and therefore excusable.¹ This finding is unnecessary to the disposition of this case, and my colleagues do not rely on it. I believe that the Board should repudiate this analysis because it is directly contrary to Supreme Court precedent.

¹ Specifically, the judge found that the representatives' conduct "would not reasonably be considered trespassing" and that "[s]uch handful of very brief and isolated forays on the lip of the driveway is [too] insignificant to warrant a finding that the union representatives were trespassing." He also found that even assuming the representatives were trespassing, their entry onto the Respondent's private property was "infrequent, insignificant, not substantial and merely harmless error, in that the union representatives did not venture far from the shoulder, the incursions were infrequent, the union representatives were very brief in approaching a driver and quick[ly] . . . return[ed] to the shoulder, and their presence did not cause any safety or other hazardous conditions of public concern."

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992), the Supreme Court squarely held that an employer cannot be compelled to allow the distribution of literature by nonemployee union representatives on its property unless the union carries the "heavy" burden of demonstrating that the employees are beyond the reach of reasonable "nontrespassory means of communication." In so holding, the Court specifically rejected the view that the degree of impairment of the employer's property rights was a relevant consideration. *Id.* at 536. Instead, the Court held that "[w]here reasonable alternative means of access exist, § 7's guarantees do not authorize trespasses by nonemployee organizers" *Id.* at 537. In this case, there neither is nor reasonably could be a claim that the Respondent's employees were inaccessible within the meaning of *Lechmere*. Accordingly, the union representatives had no Section 7 right to trespass on the Respondent's property, regardless of the scope or extent of that trespass, and the judge erred insofar as he suggested that they did.

Dated, Washington, D.C. September 22, 2017

 Philip A. Miscimarra,

Chairman

NATIONAL LABOR RELATIONS BOARD

Randy M. Girer, Esq., and Christine Gubitosa, Esq., for the General Counsel.

Christopher J. Murphy, Esq., and Michael K. Taylor, Esq., of Philadelphia, Pennsylvania, for the Respondent.

Cristina E. Gallo, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on July 14 and August 19, 2016, pursuant to a complaint issued by Region 4 of the National Labor Relations Board (NLRB) on April 28, 2016.

The complaint alleges that on about December 16, 2015,¹ the Respondent, by General Manager Bryan Cunningham, at the entrance to the facility: (a) demanded that union representatives leave a public right-of-way at which they were distributing handbills to employees; (b) threatened to summon the police to remove the union representatives who were distributing handbills to employees; (c) summoned the police to remove the union representatives who were distributing handbills to employees; (d) instructed the driver of a vehicle transporting employees to the facility to drive past the union representatives

¹ All dates are in 2015 unless otherwise indicated.

who were distributing handbills to employees; and (e) engaged in surveillance of employees receiving handbills from the union representatives.

The Image First Uniform Rental Service, Inc. (Respondent) timely filed an answer denying the material allegations in the complaint (GC Exh. 1).²

The Respondent, at the conclusion of the hearing, filed a motion on August 26, 2016, to dismiss the complaint or in the alternative, to recuse the Administrative Law Judge. On September 2, the General Counsel filed an opposition to the motion. On October 18, I denied the Respondent's motion.

On the entire record, including my assessment of the witnesses' credibility³ and my observation of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the briefs filed by the General Counsel, the Union and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a Delaware corporation, provides healthcare laundry services at a facility at 1060 Prospect Road, Columbia, Pennsylvania (the facility), where it performed services valued in excess of \$50,000 for customers located outside the State of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Philadelphia Joint Board, Workers United, a/w SEIU (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent provides linens and laundry services, such as rental, delivery of linens and laundry for washing for healthcare facilities. The Respondent employs approximately 50 nonsupervisory employees at its 1060 Prospect Road, West Hempfield Township, Pennsylvania location (facility), at issue in this complaint. The general manager of the facility, Bryan Cunningham (Cunningham), has been employed for approximately 26 years with the Respondent and held the title of general manager for about 1 year at the time of the hearing.⁴ He directs all facets of the facility's operations from sales to service to production and building maintenance (Tr. 306–308). The Respondent employs two work shifts at the facility, which starts at 5 a.m. and 6 a.m. Almost 60 percent of the workers arrive at the facility for the 5 a.m. shift (Tr. 351).

The location of the facility is on Prospect Road, which is a two lane blacktop that runs in both directions north and south in the West Hempfield Township. One would reach State Route

283 heading north and State Route 30 heading south on Prospect Road. The road is owned by the State. The two lanes are divided by a double yellow line. A vehicle heading north on Prospect Road to Route 283 would pass the facility on its right. A vehicle heading south on Prospect Road to Route 30 would have to make a left turn and cross the double yellow line to enter the facility's driveway.

Running northbound parallel to Prospect Road is a shoulder which is wide enough for a parked vehicle.⁵ There is also a low concrete curb running parallel to the shoulder which demarks the boundary where the shoulder ends and the facility's property begins. The curb is owned by the Respondent (see, visual description at R. Exh. 1). There are no sidewalks along the shoulder. The shoulder of Prospect Road is used extensively by bicyclists, pedestrians, and drivers. Drivers would also stop their vehicles to pick up or deliver mail at mailboxes that are peppered alongside the road. Drivers would also make routine and emergency stops on the shoulder.

a. The Allegation that Respondent Demand for the Union Representatives to Leave a Public Right-of-Way at Which They were Distributing Handbills to Employees

Arrival of the Four Union Representatives at the Facility

On the morning of December 16, four representatives from the Union arrived at the facility on Prospect Road. Jennifer Valentin (Valentin) testified that she was and has been the field coordinator for the Union during the past year and had duties organizing the Prospect Road facility. The Union decided to leaflet during the morning shift when the employees were driving in and out of the facility. Valentin, Gladys Toledo (Toledo), Silvia Patterson (Patterson), and Tina Gainer (Gainer) were the four union representatives who arrived that morning to leaflet the facility (Tr. 26, 27).

Valentin testified that she arrived first in her car. She said that Toledo and Patterson arrived together in a second car and Gainer arrived in a third car. Valentin said that all three cars arrived about the same time, which she believed was at 4:45 a.m. Valentin testified that the three cars were parked on the shoulder parallel to the northbound lane of Prospect Road. In an exhibit proffered by the General Counsel, Valentin pointed out that the three cars were parked north of the driveway so as to not block the traffic going in and out of the facility's parking area.⁶ Valentin further testified that the four representatives had positioned themselves either south or north of the driveway.⁷ (Tr. 29–40, 43, 118.)

⁵ R. Exh. 1 shows that the shoulder is over 10 feet wide.

⁶ The three semi-circles in GC Exh. 5 represented where the cars were parked. I note that the three cars were parked north of a fire hydrant, but before a mailbox.

⁷ The semi-circles and circles in GC Exh. 4 represented where the organizers stood, to the best of Valentin's recollection. I note from the exhibit that at one time or another, Valentin (represented as a semi-circle) had stood on the grassy area south of the driveway and on the grassy area in front of a signage that was placed north of the driveway entrance. On the other occasions, Valentin and the organizers stood on the shoulder parallel to the north bound lane of Prospect Road. Valentin testified that she only stood on the grassy area when a vehicle

² The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing briefs are identified as "GC Br." for the General Counsel, "CP Br." for the Charging Party and "R. Br." for the Respondent. The hearing transcript is referenced as "Tr."

³ Witnesses testifying at the hearing included Jennifer Valentin, Tina Gainer, Bryan Cunningham, Deanna Robinson, Brian Stutzman, and Alfonso P. Villano.

⁴ Cunningham was reassigned to a different facility in August 2016.

Tina Gainer (Gainer) testified that she has been employed with the Philadelphia Joint Board as a business agent and organizer for 4 years. Gainer is responsible for enforcing contracts and organizing different facilities for the Union. Gainer testified she was involved in leafleting at the facility on December 16. She drove in her own vehicle to the facility on December 16 and parked on the northbound shoulder of Prospect Road at about 5 a.m. She believed all three cars had their hazard lights on (Tr. 162–164).

Valentin testified that it was still dark when they arrived at the facility. She recalled seeing some light from the parking area that was located approximately 3 parking spaces down from the shoulder of the road (Tr. 40, 41). Valentin testified that she has been involved with union leafleting over 500 times in her career and was the person in charge of the leafleting on December 16. She gave instructions to the other representatives when they arrived.

Due to the dark conditions and the road traffic, Valentin first discussed safety with the three representatives. She told them to stay on the shoulder of the road, make sure they did not block the driveway to the parking area and to be careful of the traffic. Valentin also recalled instructing the representatives not to go into the driveway but to stand on either side of the driveway. She said that as a car turned into the driveway, the representatives were instructed to quickly give the drivers a union leaflet and not to insist if they refused the flyer (Tr. 43–46).

Valentin testified that 5 a.m. was a good time to leaflet since it was the beginning of the work shift. The representatives were on Prospect Road from approximately 4:45 a.m. until 6 a.m. The leaflet was red in color and had three columns. Each column had the same contents but in a different language. The leaflet demanded \$15 for the workers and their union rights (GC Exh. 6). Valentin testified that the leaflet was held up as to be visible to a driver when entering the driveway. She said that as the car slowed down to make the turn into the driveway, a representative would approach the driver of the car and hand over a leaflet. The representatives were able to distribute the leaflets to drivers making right and left turns into the driveway because they were positioned on both sides of the driveway. Valentin denied that the representatives needed to enter the driveway in order to distribute a flyer to the driver. She maintained that the leaflet was given to the drivers when they stopped at the shoulder of the road before entering the driveway. She maintained that the shoulder was wide enough to accommodate the length of a vehicle that may stop at a right angle to the road (Tr. 48–54).

Valentin testified that she stood on both sides of the driveway when handbilling. She believed that Patterson moved around and that Gainer stood on the north side with Toledo mostly standing on the south side of the driveway. Valentin insisted that she only ventured on the grassy area 4 or 5 times and mostly for less than a minute to avoid oncoming traffic. Valentin said she also entered the grassy area once to speak to Cunningham. She said that Gainer never stepped on the curb or

grassy area. Valentin believed Toledo and Patterson may have stepped onto the curb 5–10 times, each time for less than a minute. Valentin believed they had leafleted 20 vehicles during the time they were there. Gainer did not recall the number of cars that had entered the driveway (Tr. 168).

Upon my examination, Valentin testified that most of the leafleting occurred with cars heading north on Prospect Road and making a right turn entering the driveway. Valentin admitted that on occasions, she would stand in the driveway to distribute a leaflet, but insisted that she would immediately step back out of the driveway. She said that at no time were any cars delayed in making a turn due to the distribution of the leaflets. She denied that most drivers had stopped their cars inside the driveway to accept a leaflet. She said that most stopped to receive a leaflet in the shoulder area, but admitted that a few drivers were in the driveway while receiving a leaflet. She also insisted that none of the drivers had stopped on the road itself to accept a leaflet. She denied that any of the representatives entered into the parking area to distribute a leaflet (Tr. 55–59, 110–115, 119).

On cross examination, Valentin admitted that she was but should not have been in the driveway that was represented by the diagonal lines in (R. Exh. 1, Tr. 104).⁸ Valentin testified that “I should go in and leave as soon as possible, because obviously, I shouldn’t be in there (the driveway) and I shouldn’t be blocking cars” (Tr. 109, 110). Valentin admitted that a representative would, on occasion, walk diagonal on the property to leaflet a car. She did not believe any representative had engaged in conversation with a driver since they were specifically instructed by her not to do so (Tr. 116). Valentin admitted that on occasions, a representative may have entered the driveway, but no more than 5–10 feet from the shoulder area and would immediately leave the area. She insisted that no one entered above or below near the 29’4” mark noted in the diagonal driveway represented in (R. Exh. 1). However, she subsequently agreed that Patterson had gone “rogue” and entered the driveway below the 29’4” mark to give a leaflet, but insisted that no one went below the diagonal driveway and into the parking area (Tr. 119–123).

Gainer said she stood on the shoulder of the road parallel and never stepped on the grassy area. Gainer was not sure whether the other representatives had stepped on the grassy area. She admitted stepping on the curb on one occasion and believed that Toledo had also stepped onto the concrete curb (Tr. 164–168).

⁸ R. Exh. 1 is a picture description of the entrance to the facility off Prospect Road hand drawn by Cunningham. The parties agreed that his drawings are not true to scale. The exhibit represents Prospect Road going north and south with the three parked representatives’ cars on the shoulder, the concrete curb perimetering the grassy areas, the driveway designated by diagonal lines and two parking spaces. The shoulder was marked as 10’1”, representing the width of the shoulder. The driveway was marked as 29’4”, representing its width. The 4 Xs in the picture are the locations where Cunningham believed the union representatives were standing when he arrived at the scene.

passed dangerously closed to her and when she spoke to Cunningham (Tr. 46, 47).

The Challenge by the General Manager

As noted above, Cunningham has been the general manager of the Respondent's Prospect Road facility for a little more than a year. Cunningham testified that he received a telephone call from Tony Brooks, who was the service director of the facility at the time, at 4:40 a.m. on December 16. He was informed by Brooks that there were some union representatives outside of the facility. Cunningham's usual start time is from 7–7:30 a.m. On this occasion, Cunningham, who lives 20 minutes from the facility, arrived at the plant around 5:20–5:30 a.m. Cunningham testified that after he received the call from Brooks, he decided to "see what was going on" (Tr. 322).

Cunningham traveled southbound on Prospect Road and made a left turn into the facility's driveway. While making his left turn, he noticed three vehicles parked on the shoulder of the northbound lane with its lights on. Cunningham also noticed that four individuals were standing on the grassy area, which he considers as part of Respondent's property. Cunningham testified that a lady came out of a group of four people and approached his car on the driver's side while he slowed down to make the left turn. According to Cunningham, the person who approached him said she had "something to talk about" and handed him a leaflet while his car was in the driveway. Cunningham also considers the driveway as part of the Respondent's property. Cunningham accepted the leaflet and responded that he also had something to talk about to her as well. Cunningham then pulled his car front first into parking space #2. He testified that he observed "quite a bit" of cars" because 5 a.m. was the beginning of the work shift (Tr. 323–328).⁹

Valentin believed that Cunningham arrived at the facility at 5:20 a.m. Valentin said that Cunningham took the leaflet from Patterson when his car was turned into the driveway. Valentin said that Cunningham parked his vehicle in parking space #2 (GC Exh. 7).¹⁰ Valentin said that Cunningham walked over to the group and stood near the curb between the parking lot and the grassy area (designated with the letter "B" in GC Exh. 7). Valentin insisted that the representatives were standing on the shoulder and that she only walked on the grassy area to approach and speak to Cunningham (Tr. 60–64).

According to Valentin, Cunningham told her that they were not allowed to leaflet in the area. Valentin responded that they had the right to leaflet and they were not leaving. Cunningham responded that this was private property. Valentin stated that it was not private property and pointed to a 'for lease' sign. Cunningham said that the 'for lease' sign was the Respondent's sign and that they were leasing property at the facility. Valentin also pointed to the mailbox, fire hydrant and electrical lines on the shoulder which indicated to her that the shoulder was public property. Valentin said that Cunningham told her at this point that "We own into 10 feet of the street" (Tr. 64–67; see,

GC Exh. 8 showing a picture of the 'for lease' sign).

Valentin believed that their conversation lasted less than 5 minutes. She said the conversation ended with Cunningham still maintaining that they were on private property and he went back to his car and they continued to leaflet from the shoulder of the road (Tr. 69).

Gainer believed that Cunningham had arrived at 5:30–5:35 a.m. (Tr. 175). She said that Cunningham parked near the grassy area, waited a few seconds, got out of his car and walked to the representatives. Gainer recalled Cunningham told them they were not allowed to leaflet and asked them to leave. She said that Cunningham was standing just outside of the grassy area (which she described as the driveway). Gainer was standing on the shoulder when Cunningham approached them (Tr. 168–171).

Gainer heard Cunningham state that this was his property and that Valentin replied that "we are not on your property. We're out on the street, which is public property" (Tr. 172). Gainer recalled saying that this area belongs to the county. The representatives were told by Cunningham that he will call the police if they did not leave. Gainer observed Cunningham getting back in his car to use his phone with the light dome on. Gainer said they continued to leaflet. Gainer said that after a few minutes, she decided to text her husband on the phone and then called Richard Minter, the assistant manager for the Union, on how to react in a situation when the police are called (Tr. 172–174).

Cunningham testified that he left his car and walked towards the representatives. He observed that they continued to leaflet and described that the four representatives would stand on the grassy area and walked into the driveway to hand out leaflets to drivers as the cars turned into the driveway. He said that they stood on the grassy area as he approached them. Cunningham approached them and said he wanted to talk about the leafletting. He also asked them to leave (Tr. 326–329). Cunningham testified to the following (Tr. 329)

So then, I got out of my car, I walked over to the grass, and had the flyer with me and I walked up to the ladies. And I say hey—I said I got this leaflet I'd like to talk to you too. Could you please get off of our property?

Cunningham testified that he was asked to identify himself by one of the representatives. He responded that he was the general manager of the facility. He was asked why there was a "for rent" sign on the grassy area (inferring that Respondent was not actually the property owner) and Cunningham responded that Respondent was leasing some space at the facility through a realtor. Cunningham testified he repeated to the representatives to leave the property

So I asked them to get off the property and they didn't get off the property. So I walked over to my car, got back in my car and that point I call Will Brown (Director of Operations) (Tr. 330).

⁹ R. Exh. 1 shows where Cunningham stopped his car to receive a leaflet from one of the organizers and space #2 where Cunningham parked his car.

¹⁰ GC Exh. 7 is a visual description of the three spaces in the parking area with Cunningham standing in space #2. There was no view of the exhibit so it's not certain when the picture was taken and by whom.

b. The Allegation that Respondent Threatened to Summon the Police to Remove the Union Representatives who were Distributing Handbills to Employees

Cunningham testified that he called Will Brown (Brown) when he got back in the car and also made a second call to Joe Geraghty (Geraghty), who at the time, was the Chief Operating Officer (COO). Cunningham said that he called to ask them for advice and feedback. He was told by both to contact the police but to go back and tell the representatives one final time to leave the property. Cunningham again left his car and approached the representatives. He said that they were now standing on the shoulder of the northbound lane of Prospect Road. He asked them politely to stay off the property and they responded (not sure who had responded) that they have the right to be there. Cunningham testified that he had no issues with representatives standing on the shoulder (Tr. 396).

He specifically recalled one of the representatives replied "You can't tell us to leave." Cunningham then responded that if they are not going to stay off the property, he will call the police. At this point, Cunningham said he continued to observe the representatives leafleting in the driveway. He said he was also concerned of a traffic hazard that would be caused by a car having to abruptly stop for another car ahead stopping to get a leaflet (Tr. 330-334).

Valentin testified that approximately 5-10 minutes later after Cunningham got back in his car, Cunningham returned to talk with them. She said that he would ask them to leave one more time before calling the police. Valentin restated her position that the representatives were on the shoulder and on public property. Valentin said there were no further conversations and they continued to leaflet while Cunningham left the grassy area and went back into his car parked in space #2. Valentin believed this conversation lasted less than a minute (Tr. 71-73).

c. The Allegation that Respondent Summoned the Police to Remove the Union Representatives who were Distributing Handbills to Employees

Cunningham returned to his car and called the police. Cunningham believed that the police took 15-20 minutes to arrive. He recalled that the first police cruiser arrived and pulled into the driveway and the second cruiser arrived seconds later and pulled up along the northbound shoulder (See R. Exh. 1).

The police report indicated that two cruisers were dispatched at 5:33 and arrived at the facility at 5:44. Two officers in two separate police cruisers arrived at the entrance of the facility. Officers Brian Stutzman (Stutzman) and Alfonso P. Villano (Villano) were the responding officers. The police summary was written by Stutzman and is consistent with Villano's recollection of the transpiring event (GC Exh. 10; Tr. 245-247; 253).

Cunningham said that the first cruiser then backed out of the driveway and also parked on the northbound shoulder. He said that one officer (Stutzman) spoke to the representatives and a second officer (Villano) approached him. Cunningham said he got out of his car to greet the officer and was asked for his name and whether he had called the police. He responded in the affirmative and was asked what the problem was. Cunningham stated that he "did not want them on our property.

And said I'm concerned, because the way they're stopping, somebody is going to get in an accident" (Tr. 335-338).

Cunningham testified that Officer Stutzman who had spoken to the women then approached him and Officer Villano. Cunningham was informed by Officer Stutzman that the representatives felt they had the right to be there. Cunningham responded he just didn't want them on the property. Cunningham recalled that one of the officer said he was not familiar with union law and didn't know quite what to do, but was informed that the representatives had told him that they were leaving anyway. Cunningham testified that the officers then left and he had no further interaction with officers or the representatives. The police report stated that the officers left the scene at 5:55 a.m. (GC Exh. 10).

Cunningham said that the representatives left shortly after the police had departed and he then drove his car out of parking space #2 to the other side of the building and went to work (Tr. 338-340).

Valentin testified that the police arrived 5-10 minutes after her second conversation with Cunningham. She said that the first police cruiser arrived at 5:42 a.m. and the second cruiser a minute or so later. She said that Gainer was standing next to her and the other representatives were on the shoulder on the south side of the driveway (Tr. 71-74).

Valentin testified that Officer Stutzman spoke to the group. Valentin told Officer Stutzman that she was the spokesperson and the designated lead of the group. Valentin said to Officer Stutzman that if Respondent insisted on them leaving, they would because they did not want to cause any trouble. However, Valentin also informed Officer Stutzman that she believed they were on public property. According to Valentin, Officer Stutzman responded that he did not know what was going on and needed to speak with the plant manager (Tr. 75, 76).

Valentin testified that Gainer was talking to the second officer while she was speaking to Officer Stutzman. Valentin said she then approached Gainer and the second officer and engaged in their conversation. Valentin believed she heard Officer Villano say that they have an absolute right to be there and he was going to speak to the plant manager (Cunningham). Valentin said she could not hear what the officers were saying to the plant manager (Tr. 76-79).

According to Valentin, Officer Stutzman returned after speaking with Cunningham and told her that it was fine for them to continue leafleting where they were standing. Officer Villano said that it was not true that the Respondent owned 10 feet into the street and both said they were within their rights to leaflet while on the shoulder of the road. Valentin testified that neither officer told them to leave. The officers suggested that they wear protective reflective vests since it was still dark outside. Valentin recalled that she may have said that they were ready to leave anyway since it was now about 6 a.m. Valentin believed that the total time was about 10 minutes from the arrival of the police and until their departure (Tr. 79-82).

Gainer testified that the police arrived 7 to 8 minutes from the time Cunningham told them he was going to call the police. She did not recall how many cruisers arrived at the property, but remembered there were two officers. She said one cruiser parked next to them on the shoulder of the road with the haz-

ards light on but not the sirens. She said none of the representatives were on the grass when the first cruiser arrived. She said one officer approached the representatives and another went to see Cunningham.

Gainer testified she was on the phone with Minter from the time when Cunningham told them he was calling the police until the police left and admitted she did not recall everything that had transpired. However, she did speak to an officer, but admitted that the officer (Stutzman) did not talk much and he was not talking to her (Tr. 206). Gainer also admitted that she did not recall what was said or what Officer Stutzman was doing. She believed he was just standing there. Gainer recalled that the other representatives continued to leaflet the cars (Tr. 177–180).

Gainer said she did overhear Officer Villano's conversation with Cunningham. She said that the officer was standing to the side, but facing her so she heard the conversation. Testimony of record indicated that Gainer was approximately 15 feet away from Officer Villano and Cunningham (Tr. 206, 207). Gainer recalled that Officer Villano say that the shoulder was not the property of the Respondent and recalled Cunningham asking whether the Respondent would be liable if the representatives were injured while standing on the shoulder (Tr. 202–204).

Gainer recalled Officer Villano, who had spoken to Cunningham, returned to the group of representatives, and told them "this is not his property. We're allowed to be here, but we're not allowed to block traffic in any way" (Tr. 180). Gainer believed she overheard Officer Villano making the same statement to Cunningham before the officers returned to the representatives. Gainer initially believed she was 3 feet away and then said she was more likely 15–18 feet away (Tr. 181, 182, 204).

Gainer said the officers then returned to their cruisers and drove off. She insisted that she never left the shoulder of the road during the entire time. Gainer said they stayed a little longer and then left about 10 minutes after the police because the work shift was ending. At this point, Gainer finally ended her phone conversation with Minter when the police left. She did not recall when Cunningham left or in which direction he went (Tr. 183–185).

Testimony of the Two Police Officers

Police Officer Villano served 26 years with the West Hempfield Police Department and is now retired. He was one of the two answering officers on December 16 at the facility. Officer Villano testified that Officer Stutzman arrived first and he arrived 3–4 minutes later. He said that Officer Stutzman parked on the shoulder in the entrance (driveway) of the facility parallel to the road but believed that he subsequently moved his vehicle so as to not block the driveway. Officer Villano parked just north of the mailbox. He noticed two vehicles parked further south than his car on the shoulder. He said his cruiser had the 4-way hazards and flashing rooftop light bar on. He did not believe Officer Stutzman had his lights on (Tr. 233–237).

Officer Villano noticed Officer Stutzman speaking to the representatives as he arrived. He said that the police was summoned because the department received a call that people were blocking the entrance to the business and were handling out

pamphlets. Officer Villano observed the four representatives with Officer Stutzman. He said that everyone was standing on the shoulder. Officer Villano approached Officer Stutzman and was asked to walk over to the building and find the person that had filed the complaint. Villano testified that as he walked towards the parking lot, he observed someone approach him and was later identified as Cunningham. Officer Villano said they spoke in the parking lot (Tr. 238, 239).

Officer Villano asked Cunningham to identify himself and asked if he had placed the call. Cunningham responded that he was the supervisor of the business and he placed the call after being told by the Respondent's owner to call the police. Officer Villano recalled that Cunningham's specific complaint was that the representatives were trespassing. Officer Villano asked for more information. Cunningham responded that the owner told Cunningham that the Respondent owns the section of Prospect Road up to the double yellow line and since the representatives were on the road, they were considered trespassing. Cunningham also complained that they were blocking the entrance to the driveway so people could not drive in. Officer Villano recalled that Cunningham wanted the representatives arrested. Officer Villano responded that the representatives were not trespassing. Officer Villano explained to Cunningham that if the representatives decided to come on the property or attempt to get into the building, he could call the police back and they would be arrested for trespassing. Officer Villano said that he observed the representatives standing on the shoulder during this time (Tr. 239–242).

On cross-examination by Respondent's counsel (Tr. 262, 263), Officer Villano was asked to repeat exactly what Cunningham said to him:

He said that he had contacted the owner of the business, who was not on the scene. Advised the owner of the business what was going on. The owner of the business told him that (that) area of Prospect Road and the shoulder belongs to the business and that the union reps were trespassing. And he was told by the owner to call the police and have them arrested for trespassing. Also was told by Cunningham that he did not want reps on the property.

Officer Villano told Cunningham that Prospect Road is a State road and they were not trespassing if they were on the road. Villano stated that Prospect Road is maintained by the town Department of Transportation and the shoulder is considered a public area used by pedestrians, cyclists, and vehicles dropping people or picking up passengers (Tr. 247, 248, 249; GC Exh. 14 of the road statutes, para B. indicates that public could use the shoulder if there are no sidewalks).¹¹ Officer Villano also recalled that Cunningham was concerned over the safety of the representatives and with the employees pulling into the driveway going to work (Tr. 264). Officer Villano denied saying he was not familiar with labor disputes or with

¹¹ The parties stipulated at this point that the concrete curbing surrounding the grass area (referenced in R. Exh. 1) is part of the Respondent's property and that under state law, the property fee goes to the center of the road (Tr. 258, 259).

unions (Tr. 261).

Officer Villano testified that Officer Stutzman came by and briefed him on his conversation with Cunningham. Cunningham was again informed by Villano that the representatives were not trespassing. Cunningham insisted that the two officers tell the representatives that he will be calling the police again if they came on the property again. The officers agreed to relay that message to the representatives. Officers Villano and Stutzman then spoke to the union representatives that they were not allowed on the property and they will be arrested for trespassing. Officer Villano agreed with the statement posed by counsel for the Respondent that the union representatives were told "they should stay off the Image First property and that if you were called back to the property and it was demonstrated that they had trespassed that they would be arrested."

Officer Villano also stated that they were instructed not to block the driveway and to stay off the traffic lanes. The representatives were directed to stay on the shoulder and off the curb. Officer Villano did not observe any leafleting during the time of his arrival (Tr. 242–244; 256).

Officer Villano believed that the representatives said that staying off the property would not be a problem and that "they were going to be leaving within the next half hour or so anyway." Villano said that they denied being on the property while leafleting (Tr. 256, 257). The officers then left the scene at 5:55 a.m. (Tr. 245–247; GC Exh. 10).

Police Officer Brian Stutzman has over 17 years with the West Hempfield Township Police Department. He was dispatched on a trespassing call at 5:30 a.m. and arrived at the facility at 5:44 a.m.¹² He arrived first. Officer Stutzman parked at the south end of the driveway on the shoulder (GC Exh. 4) and observed the four representatives standing by the mailbox on the shoulder (as shown in GC Exh. 4). He also observed one car parked by a mailbox. He believed that Officer Villano parked behind him. He did believe he had his car lights on except for his headlights and the 4-way flashers (Tr. 271–275). Officer Stutzman said he did not block the driveway entrance and did not recall receiving a leaflet from a representative when he arrived at the scene (Tr. 280).

Officer Stutzman approached the four representatives while Officer Villano went to speak with Cunningham. He recalled being told that there was some union dispute. He told the representatives they were trespassing and they responded that they were not on the property. Officer Stutzman said he was not familiar with labor laws, but believe they needed to stay off the property and they cannot block the entrance with vehicles going in and out of the building (Tr. 282). They responded that they did not do that. Officer Stutzman also expressed concern over their safety since it was dark and they were all wearing dark clothing. They responded that they will only be there for another 10–15 minutes.

Officer Stutzman observed that they were standing on the shoulder during the entire time of their conversation. He no-

ticed there was one leafleting of a car during their conversation and believed the representative was standing on the shoulder while the car was turning into the driveway (Tr. 277, 278). On cross-examination by counsel for the Respondent, Officer Stutzman did not recall where the representative was standing when the driver was given a leaflet and did not recall which direction the car was coming from. He only remembered a representative walking over to the car to hand out a leaflet (Tr. 284, 285).

Officer Stutzman did not speak to Cunningham and did not recall the conversation that Officer Villano had with Cunningham. Officer Stutzman believed Cunningham may have told Officer Villano that he wanted the representatives arrested, but not sure since he never spoke to Cunningham. Officer Stutzman recalled that Officer Villano told the representatives that there was no trespassing violation but reminded them to be careful in the dark (Tr. 283, 284).

Officer Stutzman said that no action was taken with the representatives because he did not observe a trespass violation (Tr. 278). Officer Stutzman insisted that no arrest was warranted because he did not observe any trespassing at the moment but agreed that it would be trespassing if he had observed the representatives on the property. Officer Stutzman also stated that it would not be trespassing if the owner told the representatives to get off the property and they in fact did so (Tr. 286–288).

d. The Allegation that Respondent Instructed the Van Driver Transporting Employees to the Facility to Drive Past the Union Representatives Who were Distributing Handbills to Employees

The Respondent provides the services of a company van to transport workers without independent means to and from the facility for work. Cunningham testified without dispute that there is one van that makes two runs in the morning and two runs in the afternoon. For the morning runs, the van arrives by 5 a.m. to bring in the workers. The second run at 6 a.m. would have been the time the police and the representatives were leaving the area (Tr. 348).

Valentin testified that she observed Cunningham approach a company van as it was turning into the driveway. Valentin believed that the van arrived about the time the police officers were still talking with them or shortly thereafter. Valentin testified that

Cunningham cut off Patterson who had attempted to leaflet the van. Valentin said that Cunningham impeded the progress of Patterson as she walked towards the van and waved the van through the driveway. Valentin said that Patterson never had the chance to leaflet the van. Valentin observed that there were 5 to 10 workers in the van. Valentin said the representatives continued to leaflet about 10 more minutes after the police left (Tr. 82–84).

On cross-examination, Valentin said she witness the event with Cunningham and Patterson while standing on the shoulder. She said that Patterson attempted to leaflet the van and Cunningham got to the van first. She admitted that Cunningham did not physically stop Patterson. Valentin did not believe that the van was protruding on the road when it stopped. Valentin described the location of the van at the 29.4 mark (which was approximately half-way in the driveway) as referenced R. Exh.

¹² Villano also testified that he arrived at 5:44 a.m. (Tr. 254) but Stutzman was already talking with the organizers when he arrived. I would surmise the Villano arrived shortly after 5:44 as was his testimony that he arrived 3–4 minutes after Officer Stutzman's arrival.

1. Valentin said she was not close enough to hear if there were any conversations between the driver and Cunningham. Valentin did not recall if Cunningham was in the car when the van first approached the driveway, but maintained that he did walk towards the van (from somewhere) (Tr. 141–143).

Cunningham testified that he noticed cars coming in and out of the driveway while the officers were speaking to the women. Cunningham testified that he does not specifically recall seeing a company van arriving at this point in time. Cunningham was asked a hypothetical question as to what he may have said to a driver if a driver had stopped to ask what was happening with the police at the scene. Cunningham replied that he probably would have said that “the union is here.” Cunningham insisted that he would have taken no other action with any workers’ vehicles, including the van (Tr. 347–349; 389–390).

Cunningham insisted that he did not recall the arrival of the company van and, therefore, would not have observed any leafletting of the van.¹³ As for other drivers arriving on the scene with the presence of the police officers, Cunningham said that he may or may not have spoken to the drivers (Tr. 389–393).

Gainer recalled seeing a company van approaching northbound and making a right turn into the driveway. She describes the van as a white 12 seater van. She believed the van arrived when Cunningham returned to his car after the first time he spoke to them. Gainer does not remember if Cunningham approached the van (Tr. 176, 177).

Neither police officer witnessed the arrival of a white van. Officer Villano did not recall seeing a van (Tr. 251). Officer Stutzman did not recall seeing a white van (Tr. 227, 278).

e. The Allegation that Respondent Engaged in Surveillance of Employees Receiving Handbills from the Union Representatives

The complaint alleges that Cunningham was engaged in surveillance of the employees who arrived at work during the time the union representatives were distributing their leaflets on December 16.

Valentin testified that after the first conversation with Cunningham, she observed him returned to his car parked in space #2 while they continued to leaflet. Valentin maintained that while Cunningham was sitting in his car, he continued to observe them leafletting and also observed the workers’ cars as they passed his parked car through the car’s rearview mirror. Valentin believed she saw him turning on his dome light to observe through his rearview mirror no more than five passing cars. Valentin believed that Cunningham turned on his dome light every time a vehicle entered or exited the parking lot. She believed that the dome light went on to coincide with a car entering or exiting the driveway. Valentin observed Cunningham turning on the car’s dome light less than 5 times (Tr. 69, 70, 150–155). Valentin said she also noticed Cunningham had the car window on his side rolled down while he was smoking (Tr. 148).

Gainer testified that the dome light was on and his face was

visible to her and the drivers coming in. Gainer observed Cunningham using his phone (Tr. 176). Gainer testified that Cunningham was parked in space #2 and his face was visible with the dome light on. Gainer believed that employees could see Cunningham’s face as they drove by his car (Tr. 201, 202).

In contrast, Cunningham testified that he was busy on his cell phone talking to Brown and Geraghty and discussing their plan of action with the representatives. He denied taking any notes as to who drove in and out of the facility and denied surveillance of the arriving workers. He said it was about 15–20 minutes between the time he entered his car to call the police and when the police arrived. Cunningham recalled smoking a cigarette and checking his emails while waiting for the police to arrive (Tr. 342–45).

On cross-examination, Cunningham denied watching the leafletting while sitting in the car. He said he was watching to see when the police would arrive (Tr. 369). Cunningham said he observed, perhaps, one to six drivers entering the driveway while he was speaking to the union representatives during their first conversation that had lasted under 6 minutes (Tr. 370). He also recalled maybe two cars entering the driveway during his second conversation with the representatives and observed one approach to leaflet the car that took from 15–20 seconds (Tr. 372, 373). He never observed or heard the representatives engage in conversation with the drivers (Tr. 375). Cunningham said there were two to five cars passing through during this entire time before the arrival of the police (Tr. 376). Cunningham testified that he believed that three to five cars were leafleted during the time the police was there (Tr. 381, 382).

DISCUSSION AND ANALYSIS

The counsel for the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act on December 16 when the Respondent attempted to curtail protected activity engaged by four union representatives. The General Counsel maintains that the Respondent discovered that the representatives were distributing leaflets to employees who were driving in and out of the facility during the morning work shift. Cunningham was informed of this activity by the facility’s service director and went to the scene. The General Counsel alleges that Cunningham directed the union representatives to leave and that the police would be called if they refused to leave.

The counsel for the Respondent argues that the company has the right to “police the shoulder,” but in practice it does not object over the union representatives being present on the shoulder or anyone else (Tr. 315). The Respondent asserts that Cunningham did not demand that the union representatives be removed from the shoulder of Prospect Road. The Respondent maintains, however, the police was called because the union organizers were on the property and that the union representatives’ conduct created a substantial risk of harm (R. Br. at 13–17).

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” In turn, Section 8(a)(1) of the Act makes it unlawful for an em-

¹³ Cunningham also testified that he does not specifically recall if he observed a company van leaving the facility after dropping off the workers (Tr. 349).

ployer to “interfere with, restrain, or coerce employees in the exercise of [those] rights.” See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009).

The test for evaluating if the employer’s rule violate Section 8(a)(1) is “whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities.” *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). As with all alleged 8(a)(1) violations, the judge’s task is to “determine how a reasonable employee would interpret the action or statement of her employer . . . and such a determination appropriately takes account of the surrounding circumstances.” *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, supra.

a. The Respondent Violated Section 8(a)(1) When it Demanded that the Union Representatives Leave a Public Right-of-Way; Threatened and Summoned the Police While They were Distributing Handbills to Employees

An employer violates Section 8(a)(1) of the Act by attempting to thwart nonemployee union representatives in their efforts to communicate with employees from public property adjacent to the workplace. *Lechmere, Inc.*, 308 NLRB 1074 (1992); *Snyder’s of Hanover, Inc.*, 334 NLRB 183, 187 (2001), enf. denied in part 39 Fed Appx. 730 (3d Cir. 2002).

The Board has found that once it has been shown that nonemployee organizers have been engaged in conduct protected by Section 7, a respondent must show that it has a sufficient property interest to exclude them. *Winkle Bus Co., Inc.*, 347 NLRB 1203, 1218 (2006); *Corporate Interiors, Inc.*, 340 NLRB 732, 745 (2003); *Bristol Farms*, supra at 438–439.

It is the Respondent’s burden to establish that it had a property interest to exclude individuals from its property in a situation such as this involving a purported conflict between the exercise of Section 7 rights and private property rights. *Wild Oats Community Market*, 336 NLRB 179 (2001). In *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enf. sub nom, the Board reaffirmed precedent holding that “in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent’s private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representa-

tives, an interest which entitled it to exclude individuals from the property.” The Board also stated that in determining whether an adequate property interest has been shown, it would look to “the law that created and defined the Respondent’s property interest, which is state, rather than Federal, law.” Id.

To meet its threshold burden under *Indio Grocery*, the Respondent must show that it had a property interest in the area where the handbilling occurred. In the case of a public right-of-way, the Respondent’s burden is to show that the handbilling was outside the scope of the public easement, such that the Respondent was entitled to exercise its property interest and expel the handbillers. To establish that the handbilling was outside the scope of the public easement, the Respondent must first establish the scope of that easement.

As a general rule, a city or county right-of-way is an easement for public travel. An easement is a privilege or a right, distinct from ownership, to use in some way the land of another. Typically, a city or county does not own the fee title to the property underlying the public right-of-way; the abutting property owners have that fee title and that title usually extends to the centerline of the right-of-way. The right-of-way easement generally extends beyond the improved roadway and includes sidewalks, if any, and in this situation, the shoulder that lies between the road and the abutting concrete curb of Respondent’s property. It has been stipulated by the parties that the Respondent has a fee title to the center of Prospect Road (Tr. 258, 259).

The facts here are very similar to the situation in *Snyder’s of Hanover, Inc.*, above. In *Snyder’s*, five union representatives arrived at the vicinity of the company’s driveway and parked on the shoulder of a road. They prepared to distribute union leaflets to workers to select the union as their bargaining representative. The union handbillers stationed themselves on each side of the respondent’s driveway. On occasion, the union handbillers would enter the driveway and one was observed entering half-way down the company’s driveway. The company vice-president insisted that the union handbillers were trespassing on company property and should leave. The Respondent threatened and did summon the police when the union handbillers refused to leave the public right-of-way. The respondent in *Snyder’s* argued that under Pennsylvania law, a property owner owns the road to the center of the road subject to a public easement of passage and that it had the right to preclude activities upon a right-of-way. The Board held in *Snyder’s* that the respondent violated Section 8(a)(1) of the Act by prohibiting union representatives from distributing prounion literature in the public right-of-way adjacent to the respondent’s facility and attempting to remove the union representatives from the public right-of-way.

The counsel for the General Counsel concedes that the Respondent owns a fee to the middle of Prospect Road subject only to an easement of public use (GC Br. at 21). The counsel for the Respondent concedes that it does not object to the presence of the public or the Union being present on the shoulder of the road. The scope of the easement for public use is for walkers, parked cars, mail delivery, cyclists and other public users. The Respondent also did not argue that union activity of hand-

billing exceeded the scope of the public easement.¹⁴

Consequently, the issue squarely before me is whether the union representatives were engaged in union leafleting on the Respondent's property and not on the shoulder of the Prospect Road and whether the Respondent was concerned over public safety.

The Board noted in *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007), that: "It is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests." In *Sprain Brook Manor Nursing Home*, however, the Board found there was no evidence that the nonemployee organizers were encroaching on the respondent's property on the days that police were called and thus there was no reasonable concern regarding the protection of its private property interests.

On the morning of December 16, Cunningham was informed that there were several individuals handing out flyers on the Respondent's property. Cunningham arrived shortly thereafter and observed four individuals standing on the grassy area that is surrounded by a concrete curb. It is not disputed that the grassy area and the curb is the property of the Respondent. When Cunningham asked the four representatives to leave, Valentin questioned his authority and refused to leave. Valentin insisted that all four of the union representatives were standing on the shoulder of the northbound lane of Prospect Road and only she went on the grassy area in order to speak with Cunningham when he approached.

As in *Sprain Brook Manor*, here, the union representatives were not on Respondent's property when the police arrived at the facility. Officers Stutzman and Villano testified that the four union representatives were standing on the shoulder of the northbound lane of Prospect Road when they arrived at the scene. Cunningham demanded that the police remove (and arrest) the four representatives because they were on the Respondent's property.

Counsel for the Respondent argued that Cunningham had only wanted the four union representatives removed from the facility's property. While the Respondent's property included the public right-of-way, the Respondent concedes that it had no problem with the public or the representatives standing and walking on the shoulder. However, that was not the Respondent's position on the morning of December 16. I do not credit Cunningham's testimony that he merely wanted the four union representatives removed from the company's property.

In my opinion, I believe that the Respondent wanted the union representatives removed from the Respondent's property that it mistakenly believed included the shoulder of Prospect

Road and that it could exercise control over the shoulder of the road based upon its ownership of a fee to the center of the road.

I find that Cunningham was operating under a mistaken belief that the Respondent control of its property extended to the middle of the road without regards to the public's right-of-way or easement. I make this finding based upon the following:

Cunningham testified that he observed the representatives standing on the grassy area, which is clearly the property of the Respondent. This has been denied by Valentin and Gainer. Even assuming that the union representatives were initially standing on the grassy area, they had moved to the shoulder consistent with Cunningham's demands minutes after he told them to do so, as evidenced by his observations after speaking to Brown and Geraghty

I exited my vehicle and walked over to the women and they were now standing on the shoulder of Prospect Road. They had moved to the location on my map where it says (shoulder). I asked them to leave and the same woman as before told me no and that they had a right to be there. I walked back to vehicle and called the police.

At this point in time, Cunningham had no authority to ask the union representatives to leave or to threaten them with police action because they did exactly as he demanded. There was no reason for Cunningham to call the police because the four representatives were now on the shoulder and not on the Respondent's property. It is obvious of me that Cunningham was under a mistaken belief that the Respondent could continue to demand that the union representatives to leave a public right-of-way.

The Board has held that summoning the police to have union organizers removed from public property violates Section 8(a)(1) of the Act. *Corporate Interiors, Inc.*, above at 746; *Mr. Z's Food Mart*, 325 NLRB 871, 882-883 (1998), enf. Denied in relevant part 265 F. 3d 239 (4th Cir. 2001); *Bristol Farms, Inc.*, 311 NLRB 437 (1993); *Gainsville Mfg. Co.*, 271 NLRB 1186, 1188 (1984). Additionally, the Board has held that by claiming that union agents are trespassing on private property when in fact they are not, and calling the police to eject them as they distribute literature to employees, a respondent violates the Act. *Barkus Bakery*, 282 NLRB 351, 354 (1986), enf. 833 F.2d 306 (3rd Cir. 1987).

In *New Jersey Bell*, 308 NLRB 277 (1992), the Board found that an union representative remained in the respondent's garage for only 3 or 4 minutes after being advised by respondent's supervisor leave. The union representative was already outside the garage when the police arrived. The respondent's supervisor nevertheless advised the police that the respondent wanted to charge the union representative with trespass. The Board held the respondent's filing of criminal charges, given the short duration of the incident and the union representative's voluntary departure from the garage before the police arrived, demonstrates that the respondent had a retaliatory purpose in causing the union representative's arrest since it was not necessary to arrest the union representative and to remove him, as he had already left the garage when the police arrived. The Board also noted that there was no evidence that the union representative intended to return to the garage unless he was restrained

¹⁴ In her brief, counsel for the General Counsel found it necessary to interpret and to clarify State law in the use of public rights-of-way for handbilling and whether the local municipalities had specifically authorized handbilling within its public right-of-way as applied to this situation. I do not find such analysis is necessary to determine the merits of this allegation in the complaint. It is sufficient to address this allegation based upon the Respondent conceding that the shoulder is a public easement and that it did not object to the union representatives' handbilling on the shoulder.

from doing.

Cunningham called the police under his mistaken belief that the Respondent could demand the police to eject the union representatives from the shoulder based upon his understanding of the Respondent's fee to the center of Prospect Road. Upon the arrival of the police, Cunningham stated that the union representatives were trespassing and demanded their arrest. When it was pointed out by the police officer to Cunningham that the shoulder was a public right-of-way, he acquiesced that the union representatives could stay on the shoulder. He acquiesced only after the police told him that the shoulder was a public right-of-way and they were allowed to stay while on the shoulder (Tr. 338).

Here, testimony regarding the location and consequences of the activities of the handbillers was provided by the General Counsel's witnesses and Cunningham. Although Cunningham told them to leave Respondent's property, both Valentin and Grainer testified, without contradiction, that they were situated on the public right-of-way after their initial conversation with Cunningham. Cunningham admitted upon exiting his car on the second occasion that the union representatives were on the shoulder. He also conceded and did not protest once the police told him that the union representatives could stay on the shoulder, which the police corrected him that it was a public right-of-way.

Similar to *Snyder's of Hanover, Inc.*, above, I find that the Respondent failed to meet its threshold burden under *Indio Grocery* when Cunningham demand that the police remove the union representatives who were distributing union literature on a public right-of-way because at the time it sought to remove the union representatives, it had an interest in the property which entitled it to exclude handbillers from the property.

b. The Trespassing was Insignificant to Warrant the Removal of the Union Representatives

The Respondent argues that its general manager wanted the union representatives to leave Respondent's property. Respondent contends that it was well within its rights to remove nonemployees from its property, especially in light of the fact that the union representatives were delaying the ingress and egress of vehicles to and from the facility and causing a potential traffic hazard. The counsel for the Respondent argues that the police took no action on the trespassing charge because the police had not observed the union representatives actually trespassing on Respondent's property (R. Br. at 16).

I find here, that Cunningham, although upset that the union representatives were initially on the grassy area of the Respondent's property, did not truly believe that the alleged trespassing was so egregious to demand that the police to remove them. My finding is supported by the fact that Cunningham never demanded that the union representatives be removed or arrested for their alleged trespassing that may have occurred prior to the arrival of the police.

On this point, I fully credit the testimony of Officers Stutz-

man and Villano.¹⁵ Officer Stutzman testified that it would not be trespassing if an owner told the representatives to get off the property and they did so (Tr. 288). This is exactly what had occurred here. According to Cunningham, above, he observed the union representatives on the grassy area and in the driveway, told them to get off his property and by the time he finished the calls to Brown and Geraghty, they had already moved to the shoulder.

Officer Villano testified Cunningham never demanded they were on the property and refused to leave. On cross-examination by the Respondent, Officer Villano testified

Q. Okay. So is it only a trespass if you catch the people on the property owner's land?

A. (By Officer Villano) No, maybe I misunderstood your question. If we would arrive and Mr. Cunningham would have said they were on the property and refused to leave when told to do so, that would have been a trespass and they would have been arrested for trespassing. Even if they would have denied it at that point, it wouldn't have been my call. I would have to explain to them, take a hearing and the Judge will sort it out.

Q. Okay. But Mr. Cunningham didn't say that to you?

A. No (Tr. 270).

Officer Stutzman also recalled one leafleting occasion during his presence with a representative walking to the car. Officers Stutzman and Villano took no action even though the representative would more likely than not had entered into the Respondent's driveway while under his observation (Tr. 284, 285). Cunningham also took no action to point the trespassing to the officers.

My point is that a brief foray on the grassy area to talk to Cunningham (which I cannot conceive this to be trespassing, as argued by the Respondent, since there is an implicit understanding that one would approach another at mid-point to talk and Cunningham did not venture onto the grassy area) or to hand out a leaflet in the driveway would not reasonably be considered trespassing. Such handful of very brief and isolated forays on the lip of the driveway is insignificant to warrant a finding that the union representatives were trespassing.¹⁶ I would also take note that the Respondent did not subsequently contact the police after December 16 on alleged trespassing by union representatives and members even though it was aware of the trespassing (R. Exhs. 2-6).

Assuming such minor infractions on December 16 are considered as trespassing, I also find the trespassing as infrequent, insignificant, not substantial and merely harmless error in that the union representatives did not venture far from the shoulder,

¹⁵ The officers were neutral observers and testified in a candid and open manner. More importantly, their testimony was consistent with the corroborated record.

¹⁶ Testimony was provided by Deanna Robinson (Robinson) that she was approached by a representative while her car was parked was consistent with Valentin's admission that Patterson did enter well into the parking area. However, this was not known to Cunningham and therefore, could not have been the basis for summoning the police.

the incursions were infrequent, the union representatives were very brief in approaching a driver and quick to return to the shoulder, and their presence did not cause any safety or other hazardous conditions of public concern. Officer Villano testified that it would not be trespassing if the union representatives were briefly standing on the concrete curb to avoid traffic (Tr. 268). I find such infractions no different as when a pedestrian or cyclist would stop and rest on the curb or grassy area of the Respondent's property.

To the extent that Valentin and Gainer crossed the line onto private property, which I have found to be infrequent and quick forays, the credited testimony establishes that such incursions were minimal and were not disruptive to operations and therefore not sufficient to constitute a trespass which would justify summoning the police or with the police taking any action to arrest the representatives. See, e.g., *New Jersey Bell*, above (causing the arrest and filing of a criminal complaint against a union agent who remained on employer's premises 3 to 4 minutes after being told to leave found to violate the Act).

Accordingly, I find that the Respondent attempted to remove the union representatives engaged in union handbilling in violation of the Act and not because they were trespassing on the Respondent's property.

c. The Removal of the Union Representatives was not Motivated Over Safety Concerns

In *Great American*, 322 NLRB 17, 20–21 (1996), the Board held that an employer supermarket's summoning of the police to evict handbillers from the entrance to its parking lot did not violate the Act. In that case, the Board noted that, although the leaflets were on public property, they infringed on the respondent's "private property interest of enabling its customers unimpeded entry into the parking lot." The Board found that the handbilling "caused traffic to be blocked from entering the lot and to be backed up into the street, thus creating a potentially dangerous traffic condition also infringing on [the respondent's] private property rights." The Board found that, under such circumstances, the respondent had legitimately attempted to have the handbillers removed.

I find that a similar situation did not exist here. I do not credit Cunningham's testimony that he called the police because he was motivated by safety or traffic concerns. As in *Snyder's*, above, there is no credible evidence that the conduct of the union representatives on that day posed a threat or danger to anyone and their conduct has not been shown by the Respondent to have impeded traffic or interfered with ingress to or egress from the facility.

Cunningham testified that there was a safety concern with the union representatives distributing leaflets to cars entering the driveway with a car stopping short to receive a handbill while another vehicle may be approaching and making the same turn. However, I find the record shows otherwise. Cunningham's affidavit provided to the NLRB never mentioned he had a reasonable concern over public safety. The only statement provided by Cunningham regarding public safety was when Cunningham stated that it was the police officer, and not Cunningham, who had expressed his concern for the safety of the union representatives because it was dark outside and not

because there may be a hazardous situation with the traffic ingressing and egressing from the facility (GC Exh. 15).

Further, Cunningham's testimony of his phone calls to Brown and Geraghty was about removing the representatives. He was instructed to call the police if they refused to leave. His testimony regarding his calls to Brown and Geraghty made no mention of any safety issues with cars turning into the driveway. Cunningham may have testified that he was concerned with a car stopping to retrieve a leaflet and another having to stop short behind the first car, but that was something he did not discuss with Brown and Geraghty or included in his affidavit.

Finally, the record does not support Cunningham's concern of traffic being backed up with cars entering the driveway because of the handbilling. Cunningham testified that there were "quite a bit" of cars when he arrived at approximately 5:20–5:30 a.m. (Tr. 329). However, he also testified that the work shift starts at 5 a.m. and I would tend to believe that most of the workers were already at their job by 5:20. Cunningham's testimony of a "quite of bit" of cars is also inconsistent with his subsequent testimony. Cunningham testified that there were perhaps 1–6 workers arriving during his first conversation with the union representative after his arrival at the facility (Tr. 370). Cunningham testified that there were perhaps two cars during his second conversation with the union representatives (Tr. 372, 373). Cunningham then testified that there were 3–5 cars (or less) entering the driveway during the time the police were at the scene (Tr. 381, 382). It would be reasonable to conclude that the handbilling of union literature would not have caused a traffic hazard because, at most, Cunningham observed less than 13 cars entering the driveway from the time he arrived until the time he departed.¹⁷

As in *Sprain Brook Manor*, above at 1191–1192, the Respondent here was not motivated by any reasonable concerns when it called the police and, without any evidence establishing a need for police presence, the Board found the respondent's actions violated Section 8(a)(1).

Accordingly, I find that Cunningham simply did not want the union representatives near the Respondent's property to continue distributing union literature. Cunningham threatened and summoned the police to thwart that effort in violation of the Act.

d. The Respondent Did Not Allegedly Instruct the Van Driver to Drive Past the Union Representatives Preventing Employees from Receiving Union Handbills

The counsel for the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act when it unlawfully interfered with the employees' Section 7 rights to receive union literature when Cunningham instructed the driver of a van transporting several workers to move on pass the union representatives (GC Br. at 38, 39). The Respondent argues that the van incident never occurred and if in fact the union representatives had attempted to leaflet the van, the Respondent lawfully

¹⁷ In *Snyder's*, at least, the Respondent provided some testimony and evidence that traffic was actually "backed up" at the edge of the driveway. This was not the case here.

prevented the leafleting because the representatives were well within the Respondent's property (R. Br. at 17, 18).

In my opinion, I find that the van incident never occurred as alleged in the complaint and therefore I recommend that this allegation be dismissed.

Cunningham testified without dispute that there are two van runs on December 16, with one occurring at 5 a.m. and the second one at 6 a.m. There is no doubt that any instructions to wave the van driver to drive past the union representatives did not occur at the 5 a.m. run since Cunningham had not arrived at the facility until 5:20 a.m. at the earliest. Therefore, at best, the van incident could have only occurred during the second run. The second van run would have occurred about the time Cunningham was already leaving the scene. The testimony of record shows that the union representatives left 10 minutes after the departure of the police at 5:55 a.m. Therefore, it is reasonable to believe that no one may have been present at the driveway when the second van arrived at around 6 a.m.

I also do not credit the testimony of Valentin and Gainer on this point. Valentin and Gainer testified as to when the van incident occurred, but their recollections of the event were in stark contrast to each other.

Valentin testified that she observed Cunningham approach a company van as it turned into the driveway. Valentin believed that the van arrived about the time the police officers were still talking with them or shortly thereafter.¹⁸ Valentin testified that Cunningham cut off Patterson who attempted to leaflet the van. Valentin said that Cunningham impeded the progress of Patterson as she walked towards the van and Cunningham waved the van through the driveway. Valentin testified that Cunningham never engaged in any conversation with the van driver and Cunningham did not physically try to stop Patterson from leafleting the van.

Gainer recalled seeing a company van approaching northbound and making a right turn into the driveway at the time when Cunningham returned to his car on the first occasion, which was more than 20 minutes earlier from the time that Valentin observed the van's arrival. Gainer did not recall that Cunningham approached the van and did not testify that Patterson had approached the van.

Neither police officer witnessed the arrival of a white van. Officers Villano and Stutzman credibly testified that they did not recall seeing a van approach the driveway of the facility. It is my informed belief that if the van incident had occurred as described by Valentin, the police officers would have recalled the incident. Valentin, as noted, testified that the van approached at the time the union representatives were talking to Officer Stutzman. If so, the police officers would have noticed both Cunningham and Patterson heading towards the van. First, Officer Stutzman would have noticed Patterson leaving their conversation with the union representatives and, second, Officer Villano would have found it strange that Cunningham would have rushed away from their conversation to go after the van.

¹⁸ Valentin's recollection as to when the van arrived is consistent with my finding that the event occurred with the second van arriving at about 6 a.m. and not with the first one.

Further, Valentin described that the location of the van was midway into the driveway and on the Respondent's undisputed property. As such, I would agree with Respondent's counsel that Patterson would have been leafleting without authorization on the Respondent's property if the van incident had actually occurred (R. Br. at 17, 18). It would be my strong belief that Cunningham would have immediately pointed that out to the officers that Patterson was in the driveway and trespassing well within company property if indeed Patterson was in the driveway as described by Valentin.

Cunningham testified that he does not specifically recall seeing a company van arriving at any time during his interaction with the union representatives. Cunningham's affidavit provided to the NLRB did not record an interaction with a van (GC Exh. 15). Cunningham's testimony is consistent with his NLRB affidavit. Cunningham was asked only a hypothetical question as to what he may have said to a driver if a driver had stopped to ask what was happening with the police at the scene. Cunningham replied that he probably would have said that "the union is here." This alone does not rise to a Section 8(a)(1) violation of interfering with, restraining, or coercing employees' Section 7 rights.

Accordingly, I recommend the dismissal of this allegation.

e. The Respondent Did Not Engage in Surveillance of Employees Receiving Handbills from the Union Representatives

The complaint alleges that Cunningham engaged in surveillance of the employees who arrived at work during the time the union representatives were distributing their leaflets on December 16.

In determining whether observation of open union activity is coercive under Section 7 of the Act, the Board considers several factors, including the duration of the observation, the employer's distance from its employees while under observation and whether the employer engaged in other coercive behavior during the observation. *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). Under Board precedent, "management officials may observe public union activity, particularly without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), *enfd.* 679 F.2d 875 (4th Cir. 1982); see also *Durham School Services*, 361 NLRB No. 44, slip op. at 1 (2014) (observation of union activities in a public area was unlawful surveillance when manager "was observing employees in way that was out of the ordinary"). Such "out of the ordinary" surveillance of union activity in public places includes an employer's "unreasonably close" observation of organizers as they finish their lunches. *Montgomery Ward & Co., Inc.*, 692 F.2d 1115, 1128 (7th Cir. 1982), *enfd.* 256 NLRB 800 (1981).

The counsel for the General Counsel argues there was surveillance based upon a review of the totality of the circumstances and considering a number of relevant factors. In looking at the totality of the circumstances and applying the *Brown Transport Corp.*, 294 NLRB 969 (1989), factors, I find that the frequency Cunningham's observations were few and the duration of time less than 30 minutes. I find there were no coercive

conduct or behavior on the part of Cunningham; that there was no testimony that Cunningham was jotting down notes of passing motorists; and Cunningham credibly testified that he parked in space #2 only to wait for the police to arrive. Finally, no evidence has been proffered to show there has been prior union animus or unlawful acts in the past against the Union.

It is undisputed that when Cunningham arrived, he parked in space #2, which was not his usual space. I credit Cunningham's testimony on this point. He credibly testified to parking in space #2 to speak to the union representatives and to wait for the arrival of the police after he had called them. Contrary to the General Counsel's arguments, I find Cunningham's testimony to sit in his car and wait for the arrival of the police as reasonable and sensible and not out of the ordinary. Officer Stutzman testified that he asked Officer Villano to go into the building to find the caller who had summoned the police when Cunningham exited his vehicle to greet Officer Villano. It makes perfect sense for the caller who had summoned the police to wait for their arrival rather than have the police enter the premises in search of the caller.

I find that Cunningham did not engage in surveillance of the employees entering the driveway during this time. On this point, I do not credit Valentin's testimony. Valentin testified that Cunningham turned on his dome light every time a car drove passed Cunningham's parked car. Valentin testified that after her first conversation with Cunningham, she observed him return to his car parked in space #2 while they continued to leaflet. Valentin maintained that while Cunningham was sitting in his car, he continued to observe them leafleting and also observed the employees' cars as they passed his parked car through the car's rearview mirror. Valentin believed she saw him turning on his dome light to observe through his rearview mirror no more than five or less passing cars. She believed the turning on the dome light coincided with a car entering or exiting the driveway. Valentin testified that she also noticed Cunningham was busy smoking and talking on his cell phone.

The inference to be drawn from Valentin's testimony was that Cunningham was observing who the driver was and could only see the driver if he turned on the car's dome light. However, Valentin also testified that there was actually a light pole no more than 3 parking spaces from the driveway entrance. That would have meant that the light pole would have been very close to Cunningham's parked car in space #2 and would have illuminated a large section of the front parking lot. Under such circumstances, the dome light would not be critical and necessary in determining whether Cunningham was able to view the drivers entering the driveway. Obviously, there was no light pole located near parking space #3 contrary to Valentin's testimony as shown in (GC Exhs. 7 and 8). The dome light only becomes significant to the General Counsel's burden because the parking area actually had little to no light on the morning of December 16 (GC Exhs. 4, 5, 7, and 8).

Gainer testified that the dome light was on and his face was visible to her and the drivers coming in. It is not reasonable that Gainer would have known that Cunningham's face was visible to the passing drivers. Gainer also stated that Cunningham was using his phone. In addition, Gainer was also distracted since she admitted to being on the phone with Minter

once Cunningham said he was summoning the police.

In contrast, Cunningham testified that he was busy on his cell phone talking to Brown and Geraghty. He denied taking notes as to who drove in and out of the facility. Valentin testified that she did not observe Cunningham take any notes. Cunningham denied watching the leafleting while sitting in the car. I credit his testimony on this point that he was watching for the arrival of the police. He said he observed, perhaps, one to six drivers entering the driveway while he was speaking to the union organizers during their first conversation that had lasted under 6 minutes. His testimony is consistent with the testimony of Valentin, who also recalled less than five cars entering the driveway while waiting for the arrival of the police. Under these circumstances, Cunningham's conduct was not out of the ordinary. I find that Cunningham's presence was casual and that it would be reasonable and sensible to wait in parking space #2 for the arrival of the police and not drive away, which would have required the police to enter the building premises to inquire as to who had summoned the police. While waiting the 15 minutes for the arrival of the police, Cunningham engaged in smoking a cigarette and reviewing his emails while sitting in his car and away from the union representatives, who were at least 15 feet away according to Gainer's testimony.

Further, Cunningham never approached any drivers or impeded the distribution of leaflets by the representatives. It is even questionable that any drivers saw Cunningham's face since his car was parked forward into the parking space and there was little light except for his dome light.¹⁹ Unlike the situation in *Snyder's of Hanover, Inc.*, above, Cunningham did not remain on the driveway, did not wave at passing cars and did not call out the names of employees in those cars as the union representatives attempted to hand out literature. Passing employees were never discouraged from taking union literature. In contrast to *Snyder's*, merely monitoring union handbilling, watching traffic and telling handbillers to stay off private property and not to block traffic has been found not to be "out of the ordinary" activity that is unlawful surveillance. See *Brown Transport Corp.*, supra at 971. In *Wal-Mart Stores, Inc.*, 340 NLRB 1216, 1217 (2003), the Board found that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the employer's public park-

¹⁹ For example, in *Arrow Automotive Industries*, supra, managers stood next to the exit gates to its facility and observed the handbilling, and yelled at employees such things as "don't take that garbage," "bring that card to me" and "don't sign anything, you can end up in court." Such conduct was found to constitute unlawful surveillance. 258 NLRB at 863. Similarly, in *Gupta Permond Corp.*, 289 NLRB 1234, 1234 fn. 2 (1988), the Board affirmed the administrative law judge's finding that the respondent had unlawfully created the impression of surveillance as follows: "we emphasize the judge's finding that the Respondent was simultaneously and unlawfully interfering with the distribution of union literature on public property. Thus the Respondent's conduct went beyond . . . 'mere observation'" (citing *Hoschton Garment Co.*, 279 NLRB 565 (1986)). See also *Gainsville Mfg. Co.*, supra where the Board found that the respondent had engaged in unlawful surveillance when its plant manager attempted to prohibit the distribution of union handbills on public property and stood in close proximity to a union representative for the duration of the handbilling.

ing lot, unaccompanied by other coercive behavior, did not constitute unlawful surveillance. There is simply nothing in the record to believe or to give the impression that workers were under surveillance. As such, there is no reasonable belief on the part of the employees that they were under surveillance to give his presence a coercive effect.²⁰

Even an employer's close, as opposed to casual, observation of union activity at or near his premises in order to preclude trespass cannot be found to constitute unlawful surveillance of that activity. I find under the circumstances here of an isolated and brief event; similar conduct did not occur at this location after December 16; and the general manager did not engage in any coercive activity while waiting for the arrival of the police, the "monitoring of trespassory activity" of nonemployee union representatives does not violate Section 8(a)(1) of the Act. *Wal-Mart Stores, Inc., Id.*

Accordingly, I recommend dismissal of this allegation in the complaint.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Image First Uniform Rental Service, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Philadelphia Joint Board, Workers United, a/w SEIU, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on about December 16, 2015, by prohibiting union representatives from distributing pronoun literature in the public right-of-way adjacent to the Respondent's facility.

4. The Respondent violated Section 8(a)(1) of the Act on about December 16, 2015, by attempting to remove the union representatives from the public right-of-way.

5. The Respondent violated Section 8(a)(1) of the Act on about December 16, 2015, by threatening and summoning the police when the union representatives refused to leave from the public right-of-way.

6. The Respondent did not otherwise violate Section 8(a)(1) of the Act by allegedly engaging in surveillance of employees receiving the union literature from the union representatives about on December 16, 2015.

7. The Respondent did not otherwise violate Section 8(a)(1) of the Act when Cunningham allegedly instructed the van driver to drive past the union representatives preventing employees from receiving union handbills.

8. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate

²⁰ The counsel for the General Counsel did not call any workers as witnesses who had driven through the driveway on December 16. This would have cleared up any doubts in the record as to whether drivers had actually viewed Cunningham's face and whether his presence would have given them the impression that they were under surveillance.

ate the policies of the Act.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

The Respondent, Image First Uniform Service, Inc., Columbia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of Philadelphia Joint Board, Workers United, a/w SEIU, or any other labor organization, from distributing union literature to employees in the public right-of-way adjacent to its facility.

(b) Attempting to remove representatives of Philadelphia Joint Board, Workers United, a/w SEIU, or of any other labor organization, distributing union literature, from the public right-of-way adjacent to its facility.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its existing properties at the facility located at 1060 Prospect Road, West Hempfield Township, Pennsylvania, copies of the attached notice marked "Appendix"²² in the English, Spanish, and Tagalog languages. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

²¹ If no exceptions are filed as provided by Sec. 102.46 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 27, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities

WE WILL NOT prohibit representatives and members of Philadelphia Joint Board, Workers United a/w SEIU, or any other labor organization, from peaceful handbilling activities and distributing union literature to our employees in the public right-of-way adjacent to our facility.

WE WILL NOT interfere and attempt to remove representatives of Philadelphia Joint Board, Workers United a/w SEIU, or of

any other labor organization, distributing union literature to our employees in the public right-of-way adjacent to our facility by (1) demanding that the representatives and members leave the public right-of-way; (2) threatening to call the police to have the representatives and members removed for trespassing if they do not leave; and (3) contacting the police in an effort to remove the representatives and members for trespassing

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

IMAGE FIRST UNIFORM SERVICE, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-166319 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

